

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

GREGORY CASTRO,  
Plaintiff,  
v.  
JO ANNE B. BARNHART,  
Commissioner of Social  
Security,  
Defendant.

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BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 17, 21), submitted for disposition without oral argument on October 11, 2005. Attorney Kenneth L. Isserlis represents Plaintiff; Special Assistant United States Attorney Jeffrey H. Baird represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 14.) After reviewing the administrative record and the briefs filed by the parties, including the supplemental briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment and remands for an immediate award of benefits.

26 Plaintiff, 29-years-old at the time of the administrative  
27 decision, filed an application for Social Security disability  
28 benefits on August 29, 2000, alleging onset as of March 27, 2000,

1 due to hospitalization for psychiatric treatment. (Tr. at 17.) On  
2 May 9, 2002, he filed an application for Supplemental Security  
3 Income (SSI) benefits; the applications were consolidated.  
4 Plaintiff, a high school graduate, had relevant past work as a  
5 server assistant, sales associate, janitor, special event staffer,  
6 security guard and apprentice laborer. (Tr. at 17.) Following a  
7 denial of benefits at the initial stage and on reconsideration, a  
8 hearing was held before Administrative Law Judge R. J. Payne (ALJ).  
9 The ALJ denied benefits; review was denied by the Appeals Council.  
10 This appeal followed. Jurisdiction is appropriate pursuant to 42  
11 U.S.C. § 405(g).

12 **ADMINISTRATIVE DECISION**

13 The ALJ concluded Plaintiff met the non-disability requirements  
14 for a period of disability and was insured for benefits through the  
15 date of his decision. Plaintiff had not engaged in substantial  
16 gainful activity and had severe mental disorders, but the  
17 impairments were not found to meet the Listings. The ALJ concluded  
18 Plaintiff met the qualifications for disability during his  
19 psychiatric hospitalization from March 27, 2000, to January 30,  
20 2002, but because it was involuntary and court-ordered pursuant to  
21 pending criminal charges, no benefits were due and payable to  
22 Plaintiff. The ALJ also found after his release from the hospital,  
23 Plaintiff has been medically compliant, stable on medication, and  
24 without any delusions or paranoid thoughts. The ALJ concluded  
25 Plaintiff retained the residual capacity to perform his past work or  
26 make an adjustment to other work which exists in significant numbers  
27 in the national economy. (Tr. at 22.) Thus, the ALJ found there  
28 was no disability after January 30, 2002.

## ISSUES

The question presented is whether there was substantial evidence to support the ALJ's decision denying benefits and, if so, whether that decision was based on proper legal standards. Plaintiff asserts the ALJ erred when he (1) relied on Plaintiff's expressed desire to work, (2) relied on the non-examining medical expert's unsupported opinion, (3) rejected Plaintiff's testimony, (4) rejected Dr. Lammers' opinion, (5) concluded Plaintiff could perform his past relevant work, and (6) relied on the Grids to conclude Plaintiff could perform other work which exists in significant numbers in the national economy. Finding issues one, two and four to be dispositive, the remaining are not addressed.

## **STANDARD OF REVIEW**

14       In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
15 court set out the standard of review:<sup>1</sup>

The decision of the Commissioner may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Morgan v. Comm'r of Soc. Sec. Admin.* 169 F.3d 595, 599 (9th Cir. 1999).

The ALJ is responsible for determining credibility,

25       <sup>1</sup>The parties have not raised the issue of whether this matter  
26 should be reviewed under the medical improvement standard following  
27 a period of disability. See 20 C.F.R. § 404.1593 and 1594. Thus,  
28 this court does not address that standard.

1 resolving conflicts in medical testimony, and resolving  
 2 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
 3 Cir. 1995). The ALJ's determinations of law are reviewed  
 4 *de novo*, although deference is owed to a reasonable  
 5 construction of the applicable statutes. *McNatt v. Apfel*,  
 6 201 F.3d 1084, 1087 (9th Cir. 2000).

#### 5 **SEQUENTIAL PROCESS**

6 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the  
 7 requirements necessary to establish disability:

8 Under the Social Security Act, individuals who are  
 9 "under a disability" are eligible to receive benefits. 42  
 10 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any  
 11 medically determinable physical or mental impairment"  
 12 which prevents one from engaging "in any substantial  
 13 gainful activity" and is expected to result in death or  
 14 last "for a continuous period of not less than 12 months."  
 15 42 U.S.C. § 423(d)(1)(A). Such an impairment must result  
 16 from "anatomical, physiological, or psychological  
 17 abnormalities which are demonstrable by medically  
 18 acceptable clinical and laboratory diagnostic techniques."  
 19 42 U.S.C. § 423(d)(3). The Act also provides that a  
 20 claimant will be eligible for benefits only if his  
 21 impairments "are of such severity that he is not only  
 22 unable to do his previous work but cannot, considering his  
 23 age, education and work experience, engage in any other  
 24 kind of substantial gainful work which exists in the  
 national economy . . ." 42 U.S.C. § 423(d)(2)(A). Thus,  
 the definition of disability consists of both medical and  
 vocational components.

25 In evaluating whether a claimant suffers from a  
 26 disability, an ALJ must apply a five-step sequential  
 27 inquiry addressing both components of the definition,  
 28 until a question is answered affirmatively or negatively  
 in such a way that an ultimate determination can be made.  
 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The  
 claimant bears the burden of proving that [s]he is  
 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.  
 1999). This requires the presentation of "complete and  
 detailed objective medical reports of h[is] condition from  
 licensed medical professionals." *Id.* (citing 20 C.F.R. §§  
 404.1512(a)-(b), 404.1513(d)).

#### 25 **ANALYSIS**

##### 26 1. Undisputed Facts

27 It is undisputed Plaintiff was hospitalized following a plea of  
 28 not guilty by reason of insanity to a charge of first-degree

1 robbery. (Tr. at 404.) That hospitalization continued for 22  
2 months, followed by a conditional release to the community based on  
3 a mental health treatment plan and approval of the release by  
4 Whitman County Superior Court. (Tr. at 225, 231.) It also is  
5 undisputed the ALJ concluded Plaintiff was disabled during the  
6 period of his hospitalization, but ineligible to receive benefits  
7 because of his placement in a public institution. (Tr. at 20.) It  
8 is undisputed from the medical records Plaintiff complied with all  
9 phases of his treatment program and that medication resolved the  
10 symptoms of paranoid delusions. (Tr. at 327.) Finally, it is  
11 undisputed Plaintiff indicated to treatment providers, both during  
12 and after his hospitalization, that he desired to return to work  
13 and/or an educational program. (Tr. at 220, 223.) The only  
14 question is whether his mental and emotional health prevented his  
15 handling the stress associated with normal work activity.

16 2. Rejection of Opinion of Treating Physician

17 Plaintiff asserts the ALJ improperly rejected the opinion of  
18 the examining psychologist, Craig Lammers, Ph.D., without  
19 explanation, a report he alleges was consistent with the opinions of  
20 the psychiatrists who treated Plaintiff immediately before and after  
21 his release from the psychiatric hospital. Dr. Lammers stated with  
22 respect to Plaintiff's employability:

23 As noted above, Mr. Castro is presenting as rather  
24 symptom-free at this time. While one could thus assume  
25 that he is capable of employment, in my opinion this would  
26 be extremely premature to request this of him. He has  
27 very recently been discharged from an involuntary  
28 hospitalization that lasted for almost two years. This  
would suggest that his symptoms were difficult to manage  
and that it took a rather prolonged period of time for him  
to obtain emotional stability. While he is presently  
symptom-free of his psychotic disorder, I would describe  
him as rather fragile as he tries to make an adjustment

1 back into society following his hospitalization. Although  
 2 symptom-free, it does not necessarily indicate that he is  
 3 capable of coping with the demands that employment would  
 4 place on him. His performance on the MMPI-2 would suggest  
 5 that he is still experiencing periods of intense anxiety  
 6 accompanied by very low confidence, social discomfort, and  
 7 some isolation. His history would suggest that the  
 8 symptoms have been somewhat present for him dating back to  
 9 his high school years, and there is also a very definite  
 10 pattern that his symptoms are exacerbated during periods  
 11 of stress and tension. Thus it is most likely that his  
 12 trying to seek and maintain employment would create  
 significant stress for him, and thus increase the  
 likelihood of a reoccurrence of his psychotic symptoms.  
 Mr. Castro's focus during this time should be maintaining  
 his emotional stability through stable housing, ongoing  
 treatment, and frequent contact with his support system.  
 Again, requiring more of him at this time would more  
 likely than not lead to some reoccurrence of his above  
 noted symptoms. If Mr. Castro were to remain symptom-free  
 for a rather prolonged period of time, it would most  
 likely increase a positive prognosis as to his abilities  
 to find and maintain employment sometime in the future.

13 (Tr. at 356-357.) In an accompanying psychiatric review. Dr.  
 14 Lammers indicated Plaintiff's condition met the Listings under  
 15 12.03, psychotic disorders. (Tr. at 361.)

16 Case law requires the opinions of examining physicians, when  
 17 uncontroverted, be rejected only with "clear and convincing"  
 18 evidence. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). If  
 19 controverted, the reasons must be specific and supported by the  
 20 record. *Flaten v. Secretary of Health and Human Serv.*, 44 F.3d 1453,  
 21 1463 (9th Cir. 1995). There is no other examining or treating  
 22 physician who contradicts Dr. Lammers' diagnosis or opinion. Thus,  
 23 the ALJ must provide clear and convincing reasons for rejecting it.

24 The ALJ referred to Dr. Lammers' findings in his opinion  
 25 (reference to Exhibit 15F, Tr. at 18). He also noted Plaintiff was  
 26 living independently with a roommate and his daily activities  
 27 consisted of working around his trailer park, walking, watching  
 28 television and weekend dirt-biking and that although he felt he had

1 too much time on his hands, he did not feel capable of working. The  
2 ALJ noted examination assessments since his release have confirmed  
3 medication compliance, stability and symptom-free status. (Tr. at  
4 21, 333-47.) The ALJ relied on Plaintiff's expressed representations  
5 he intended to return to work and independent living, that he fully  
6 understood his condition and its effect on his cognitive abilities,  
7 and that, as long as he was medically compliant, he should remain  
8 healthy with no exacerbation of delusional symptoms. (Tr. at 21.)  
9 Finally, the ALJ stated treatment records from Spokane Community  
10 Mental Health (SCMH) providers demonstrated continued stability and  
11 compliance with the medication protocol.

12 Plaintiff argues the ALJ improperly considered his desire to  
13 return to work, citing *Cox v. Califano*, 587 F.2d 988, 991 (9<sup>th</sup> Cir.  
14 1978), that held a willingness to engage in rehabilitative activity  
15 is clearly not probative of a present ability to do so. Dr.  
16 Lammers' opinion and the providers at SCMH agreed Plaintiff,  
17 although willing, was not able to handle the stress of full time  
18 work upon his immediate release from hospitalization. (Tr. at 333,  
19 334, 350.) Thus, although Plaintiff's statements offer some  
20 support for his ability to work, they are not conclusive by  
21 themselves, particularly when viewed against the medical treatment  
22 record. *Cox*, at 991. Additionally, the fact Plaintiff was  
23 responding to treatment does not provide clear and convincing  
24 reasons for disregarding Dr. Lammers' opinion. *Rodriguez v. Bowen*,  
25 876 F.2d 759, 763 (9<sup>th</sup> Cir. 1989). The ALJ must consider both the  
26 objective and subjective findings of the treating / examining  
27 physicians. *Id.* at 762. No examining or treating physician opined  
28 Plaintiff was ready to return to work the day his hospitalization

1 ended. Accordingly, the opinions of the treating and examining  
2 physician must be credited as true. *Lester v. Chater*, 81 F.3d 821,  
3 834 (9th Cir. 1995).

4 3. Opinion of Consulting Physician

5 Plaintiff contends the ALJ improperly relied on the testimony  
6 of the medical expert, Dr. Bostwick. Dr. Bostwick rejected Dr.  
7 Lammers' findings on three grounds: First, Dr. Lammers was under a  
8 faulty belief Plaintiff's criminal charge involved burglary rather  
9 than robbery. (Tr. at 415.) Second, his 22-month stay in the  
10 hospital was for legal reasons, not medical. Third, Dr. Bostwick  
11 noted the specific one-seven profile demonstrated by the MMPI  
12 administered by Dr. Lammers did not reflect paranoia, but rather a  
13 neurotic profile showing obsessive worry, nervousness, or anxiety  
14 and that the description of extreme limitations was not reflected in  
15 the medical history. (Tr. at 415.)

16 The opinion of a non-examining physician, here that of Dr.  
17 Bostwick, may be accepted as substantial evidence if it is supported  
18 by other evidence in the record and is consistent with it. *Andrews*  
19 *v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995); *Lester v. Chater*, 81  
20 F.3d 821, 830-31 (9th Cir. 1995). The opinion of a non-examining  
21 physician cannot by itself constitute substantial evidence that  
22 justifies the rejection of the opinion of either an examining  
23 physician or a treating physician. *Lester*, at 831, citing *Pitzer v.*  
24 *Sullivan*, 908 F.2d 502, 506 n.4 (9th Cir. 1990). Cases have upheld  
25 rejection of an examining or treating physician based in part on the  
26 testimony of a non-examining medical advisor; but those opinions  
27 have also included reasons to reject the opinions of examining and  
28 treating physicians that were independent of the non-examining

1 doctor's opinion. *Lester*, at 831, citing *Magallanes v. Bowen*, 881  
2 F.2d 747, 751-55 (9th Cir. 1989) (reliance on laboratory test  
3 results, contrary reports from examining physicians and testimony  
4 from claimant that conflicted with treating physician's opinion);  
5 *Andrews*, 53 F.3d at 1043 (conflict with opinions of five non-  
6 examining mental health professionals, testimony of claimant and  
7 medical reports); *Roberts v. Shalala*, 66 F.3d 179 (9th Cir 1995)  
8 (rejection of examining psychologist's functional assessment which  
9 conflicted with his own written report and test results). Thus,  
10 case law requires not only an opinion from the consulting physician,  
11 but also substantial evidence (more than a mere scintilla, but less  
12 than a preponderance), independent of that opinion which supports  
13 the rejection of contrary conclusions by examining or treating  
14 physicians. *Andrews*, 53 F.3d at 1039.

15 Dr. Bostwick's rationale is not consistent with the medical  
16 record. Even assuming Dr. Lammers was under a mistaken impression  
17 Plaintiff's criminal charge involved burglary rather than robbery,  
18 there is no medical rationale that would support a different  
19 diagnosis or residual findings because of the discrepancy in his  
20 misunderstanding of the criminal charge.

21 Although Plaintiff expressed a desire to obtain full time work  
22 after his release, his ability to cope with the stress associated  
23 with work was questioned by medical reports and findings. During  
24 his second visit to Spokane Community Mental Health (SCMH) in May  
25 2002, some four months after his release from hospitalization,  
26 without consideration of any stress resulting from job performance,  
27 Plaintiff expressed to SCMH providers anxiety and stress from  
28 dealing with ongoing events, e.g. evaluation for SSI, child support

1 issues, setting up goals, and finding a way to live his life so that  
2 he could deal with the stress. (Tr. at 334.) Paxil was increased  
3 and his global assessment of functioning was assessed at 51-60,  
4 indicating a range of moderate impairment. DIAGNOSTIC AND STATISTICAL  
5 MANUAL OF MENTAL DISORDERS, FOURTH EDITION (DSM-IV), at 32 (1995). The  
6 increased anxiety also was noted by Dr. Lammers who conducted his  
7 examination at the same time.

8 Dr. Bostwick's opinion that Plaintiff's hospitalization was due  
9 to legal, rather than emotional issues, is contradicted first by the  
10 ALJ's decision to find disability during that period. Second,  
11 although it appears from the record, Plaintiff's hospitalization was  
12 extended for an additional four months while he awaited court  
13 approval of his community placement, the term of his hospitalization  
14 was governed by RCW 10.77. (Tr. at 196.) There was no pre-set  
15 "term" of hospitalization imposed by the court; Plaintiff was to be  
16 hospitalized until he was medically capable of meeting the terms of  
17 the conditional release. Plaintiff applied for conditional release  
18 in June 2001. (Tr. at 221.) The court agreed to general conditions  
19 of release on August 14, 2001. (Tr. at 231.) Clinic notes indicate  
20 later treatment involving "redirection" following conflicts with  
21 other patients. (Tr. at 273, 274.) Plaintiff was reported to be  
22 stable and ready for conditional release on September 26, 2001, but  
23 was awaiting a placement in the community and completion of the  
24 proper notification required by the court. (Tr. at 277, 278, 282.)  
25 From the end of September to Plaintiff's release in January, his  
26 condition remained stable while he participated in hospital  
27 programs. (Tr. at 277-292.) Thus, it appears his hospitalization was  
28 extended only for an additional four months due to court

1 requirements.<sup>2</sup> Nonetheless, the ALJ concluded Plaintiff remained  
 2 disabled until his release in January 2002.

3 Finally, Dr. Bostwick opined the MMPI results were not  
 4 indicative of paranoia, but excessive worry and anxiety. Dr.  
 5 Lammers noted MMPI results indicated "periods of intense anxiety,  
 6 low confidence, social discomfort, and isolation." (Tr. at 356.)  
 7 Thus, Dr. Lammers' opinion reflected a correct reading of the MMPI.  
 8 Additionally, the working diagnosis for medical providers at SCMH in  
 9 April and May 2002 included delusional disorder, persecutory type,  
 10 substance abuse in remission, anxiety disorder with panic attacks,  
 11 and social phobia. (Tr. at 333, 334.) Moreover, Plaintiff's  
 12 release to the community was pursuant to a recommended mental health  
 13 treatment plan that included further examination and treatment,  
 14 counseling, and continued medication. Thus, Dr. Bostwick's opinion  
 15 was not consistent with the medical record or supported by it.  
 16 Accordingly,

17       **IT IS ORDERED:**

18       1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 17**) is  
 19 **GRANTED**; the matter is **REMANDED** for an immediate award of benefits,  
 20 based on an onset date of January 31, 2002.

21       2. Defendant's Motion for Summary Judgment dismissal (**Ct.**  
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23       <sup>2</sup>Although not necessary to the court's opinion based on the  
 24 analysis of the first issue above, evidence submitted post-hearing  
 25 to the Appeals Council from the treating and examining physicians,  
 26 indicates continued disability upon release based on a need for  
 27 transition back to the community without the possibility of relapse.  
 28 (Tr. at 404-406, 400-403.)

1 || Rec. 21) is DENIED.

2           3. Any application for attorney fees shall be made by  
3 separate motion.

4       4. The District Court Executive is directed to file this  
5 Order and provide a copy to counsel for Plaintiff and Defendant.  
6 The file shall be **CLOSED** and judgment entered for Plaintiff.

7 DATED November 29, 2005.

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9 S/ CYNTHIA IMBROGNO  
UNITED STATES MAGISTRATE JUDGE

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ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DIRECTING AN IMMEDIATE AWARD OF BENEFITS - 12